COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-717-DG

BROWN-FORMAN CORPORATION, ET AL. — APPELLANTS

Court of Appeals No. 2013-CA-002048-MR

vs.

Appeal from Jefferson Circuit Court
Civil Action No. 12-CI-003382
Division Nine, Hon. Judith E. McDonald-Burkman

BRUCE MERRICK, ET AL. — APPELLEES

* * * * * * * * *

BRIEF FOR APPELLEES

Respectfully Submitted,

William F. McMurry
WILLIAM F. MCMURRY &
ASSOCIATES
624 W. Main Street, Suite 600
Louisville, KY 40202
Telephone: (502) 326-9000
Co-Counsel for Appellees

Douglas H. Morris
Lea A. Player
MORRIS & PLAYER PLLC
1211 Herr Lane, Suite 205
Louisville, KY 40222
Co-Counsel for Appellees

CERTIFICATE OF SERVICE

The below signature is to certify that a true and correct copy of this Brief for Appellees was transmitted by U.S. postage prepaid on this 14th day of December, 2015, to the following: Charles J. Cronan IV, Marjorie A. Farris, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202; Donald J. Kelly, Lisa C. DeJaco, Wyatt, Tarrant & Combs LLP, 500 W. Jefferson Street, Suite 2800, Louisville, Kentucky 40202; Honorable Judith E. McDonald-Burkman, Jefferson Circuit Court, Division Nine, Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

Counsel for Appellees

INTRODUCTION

Appellees are property owners in the vicinity of Appellants' whiskey operations. Due to uncontrolled ethanol emitting from Appellants' operations, Appellees' property is blighted with whiskey fungus. Appellants appealed to this Court the Court of Appeals' Opinion Reversing and Remanding an Order of the Jefferson Circuit Court dismissing all of Appellees' claims pursuant to CR12.02(f) as preempted by the federal Clean Air Act. The Court of Appeals' decision is in accord with the Sixth Circuit's recent pronouncement under the same facts in Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015), *rehearing en banc denied* Dec. 7, 2015.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees respectfully request oral argument in this matter which will present the most efficient opportunity for the parties to more fully apprise the Court of the facts and issues in dispute.

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STATEMENT OF THE CASE

Factual Summary. Appellants' operations – the fermentation, distillation, aging, warehousing and bottling stages of whiskey production – release thousands of tons of ethanol into the atmosphere in Appellees' neighborhoods. First Amended Complaint ("Am. Complt."), ¶¶21-25 [R. 152]. These abundant ethanol emissions cause a unique ethanol-dependent black fungus, *Baudoinia compniacensis* ("whiskey fungus") to accumulate on real and personal property in the vicinity of Appellants' operations. Id. ¶¶2-3, 22-34 [R. 149; 152-153]. In the presence of such abundant ethanol, whiskey fungus grows on essentially every surface of Appellees' property – wood, vinyl, metal, concrete. Id. ¶¶28-34 [R. 153]. The fungus is unsightly, making the property appear dirty and dilapidated and requires an abnormal amount of time, money, energy and equipment to remove. Id., ¶34-38 [R. 153-154]. The fungus itself and the cleaning measures necessary to remove it cause early weathering of Appellees' real and personal property. Id., ¶40 [R. 154].

The fact that whiskey fungus is a serious nuisance is further borne out by a Notice of Violation issued by the Louisville Metro Air Pollution Control District to another whiskey manufacturer, Diageo, which operates whiskey production facilities in Louisville, Kentucky. Id. ¶¶78-83 [R. 163-164]. The Notice of Violation[1] was issued pursuant to a local regulation that prohibits the "emission of air pollutants… which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health, or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or

[1] The Notice of Violation and Jefferson Co. APCD Regulation 1.09 were discussed in and attached to Appellees' Response to the Motion to Dismiss. [R.301-3; 357-8; 368-9; 406].

property." Id. ¶78 [R. 163]. The agency's investigation concluded that the proliferation of whiskey fungus due to ethanol emissions resulted in damage to property and loss of money spent cleaning or replacing property and that the rapid growth of *Baudoinia* made it almost impossible for nearby residents to keep their homes, vehicles, and other property clean. Id. ¶81 [R. 163-164]. It concluded that *Baudoinia* presents a continuing threat of harm to the residents' property and that residents are unable to relax and enjoy being outdoors because of the appearance of their property, as well as the threat of possible health effects. Id. ¶¶82-83 [R. 164]. Appellants' operations release ethanol into the atmosphere in amounts similar or greater than Diageo and are just as much a nuisance to property owners in their vicinity. Id. ¶84 [R. 164].

Technology that reduces ethanol emissions to practically nil has been in place in the California brandy industry since 2005, and is available and feasible for use in Appellants' operations. Id. ¶¶131-140 [R.170-71]. Appellants do not claim it is impossible to lower their ethanol emissions. With respect to whiskey aging, only, Appellants claim they cannot reduce ethanol emissions without harming product quality. [R. 238]. Appellees thoroughly debunked this notion [R. 304-314], while also objecting to the trial court deciding, on a Motion to Dismiss, the factual disputes in Appellants' favor on whether they violated air pollution regulations and whether ethanol emissions from whiskey aging could be controlled. [R. 298, 301]. The court concluded erroneously that Appellees had not alleged violations of air pollution regulations [see R. 163-64] and that resolution of the issue of whether or not Appellants could reduce emissions was not necessary to the preemption decision. [R. 688].

Procedural History. Prior to the commencement of discovery, and in lieu of answering Appellees' initial Complaint filed June 15, 2012 [R. 1-46], Appellants filed a Rule 12.02(f) Motion to Dismiss for failure to state a claim on July 9, 2012. [R. 49-67]. The initial motion to dismiss did not argue federal preemption. Simultaneous with a response to the motion, Appellees moved the court to file the First Amended Complaint. By agreement, the motion to amend was granted and Appellants' initial motion to dismiss was denied as moot. [R. 182]. The First Amended Complaint was filed September 11, 2012. [R. 149-178]. Again, in lieu of an answer, on November 8, 2012, Appellants filed a second Rule 12.02(f) Motion to Dismiss [R. 235-278] this time arguing, *inter alia*, that claims arising from ethanol emissions are preempted by the federal Clean Air Act ("CAA"). Appellees timely filed a Response [R. 298-602] and oral arguments were held on March 4, 2013. On July 30, 2013, the trial court issued an Order finding Appellees' claims preempted by the Clean Air Act.[2] [R. 687-690]. In so deciding, the trial court looked to the U.S. Supreme Court's decision in Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527 (2011) ("AEP") (which held that *federal* common law, not state common law, was preempted by the CAA). The trial court also cited three United States district court opinions decided after AEP and concluded that preemption applied because Appellees had "not cited any authority decided since Am. Elec. Power that supports the argument that state tort claims are not preempted." [R. 689].

On Friday, July 26, 2013, just four days before the trial court issued its order, the Second Circuit decided In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 725 F.3d 65, 104 (2nd Cir. 2013), *cert. denied sub nom.*, Exxon Mobil Corp. v. City of

[2] The trial court addressed only federal preemption and did not reach Appellees' other arguments. Accordingly, federal preemption is the only issue on appeal.

New York, N.Y., 134 S. Ct. 1877 (2014), holding that state tort law claims, including negligence, trespass and nuisance, were not preempted by the CAA. Appellees timely filed a motion to reconsider pointing out the MTBE decision. [R. 693-750]. While the motion to reconsider was pending, the Third Circuit reversed the primary district court decision relied upon by Appellants and the trial court. Bell v. Cheswick, 734 F.3d 188 (3rd Cir. 2013) (*reversing* 903 F. Supp. 2d 314 (W.D. Pa. 2012)) 734 F.3d 188 (3rd Cir. 2013), *cert. denied*, GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014). In Bell, the Third Circuit, like the Second Circuit in MTBE, held that the CAA did not preempt state tort claims for nuisance, negligence and trespass. Appellees filed the Bell decision with the trial court. [R. 814-826]. In their Reply on the Motion to Reconsider [R. 889], Appellees also pointed out that the Bell decision overruled *sub silento* the other Pennsylvania case the trial court had relied upon, U.S. v. EME Homer City Generation L.P., 823 F.Supp.2d 274 (W.D. Pa. 2011) *aff'd on other grounds*, 727 F.3d 274 (3rd Cir. 2013), because the district court judge who wrote Homer was the same judge who wrote the district court Bell decision (using virtually verbatim language) that the Third Circuit reversed. Appellees further noted that the day after the Bell decision was rendered, the Third Circuit in U.S. v. EME Homer City Generation L.P., 727 F.3d at 300, did not affirm the lower court's decision on preemption grounds and instead ruled that the claims had not been preserved for appeal. Appellees also pointed out that the third and final district court decision relied upon by the trial court was also not affirmed on preemption grounds; but rather, the Fifth Circuit found the entire action was subject to dismissal pursuant to *res judicata* without approving the lower court's preemption analysis. Comer v. Murphy Oil USA, 718 F.3d 460 (5th Cir. 2013) (*affirming on other grounds* 839 F.

Supp. 2d 849 (S.D. Miss. 2012)). Finally, while the motion was pending, the Franklin Circuit Court issued its opinion in Mills v. Buffalo Trace Distillery, Inc., 12-CI-00743 (August 28, 2013) that the CAA did not preempt similar claims on behalf of residents affected by the Buffalo Trace and Jim Beam whiskey operations. This opinion was also submitted to the trial court. [R. 827-836]. Thus, at the time of reconsideration, all of the post-AEP courts agreed that the CAA did not preempt Appellees' claims.

On November 26, 2013, the trial court denied the Motion to Reconsider, rejected the recent majority decisions, and instead relied upon the pre-AEP case of North Carolina ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010) to preempt Appellees' claims. The trial court's erroneous decision to rely upon Cooper is discussed further below. Appellees timely appealed. [R. 914-924]. On November 14, 2014, the Court of Appeals issued its Opinion Reversing and Remanding the trial court.

While the present case was on appeal, the Sixth Circuit accepted interlocutory review pursuant to 28 U.S.C. 1292(b) of a similar case brought in federal court by property owners against another whiskey manufacturer, Diageo Americas Supply, Inc., with operations in Kentucky. The federal district court's decision finding no CAA preemption of property owners' claims against Diageo due to whiskey fungus was affirmed in Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015), *rehearing en banc denied* Dec. 7, 2015.

ARGUMENT

The issues addressed on this Appeal were preserved by Appellees' Response to Motion to Dismiss [R. 298-602], Motion to Reconsider [R. 693-750], Supplemental Authority (Bell) [R. 814-826], Supplemental Authority (Franklin Cir. Ct.) [827-836],

Reply on Motion to Reconsider [R. 886-903], and Appellees' timely Notice of Appeal. [R. 914-924].

I. STANDARD OF REVIEW OF THE JEFFERSON CIRCUIT COURT'S DECISION

A motion to dismiss should be granted only where "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." Pari–Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977). "[T]he allegations contained... are to be treated as true and must be construed in a light most favorable to the pleading party.... The test is whether the pleading sets forth **any** set of facts which—if proven—would entitle the party to relief. If so, the pleading is sufficient to state a claim." Mitchell v. Coldstream Laboratories, Inc., 337 S.W.3d 642, 644-45 (Ky. App. 2010) (emphasis in original; citations omitted). Appellate review is *de novo*. Revenue Cabinet v. Hubbard, 37 S.W.3d 717 (Ky. 2000). Supreme Court decisions on federal questions, constitutional issues or federal statutes are binding. Jefferson County v. Zaring, 91 S.W.3d 583, 586 (Ky. 2002). Sixth Circuit decisions are accorded great respect. Cook v. Popplewell, 394 S.W.3d 323, 346 (Ky. 2011) (Justice Abramson concurring). The party asserting federal preemption of state law bears the burden of establishing preemption. Wyeth v. Levine, 555 U.S. 555, 569 (2009); Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 255 (1984).

II. THE OVERWHELMING MAJORITY OF COURTS HAVE HELD THE CAA DOES NOT PREEMPT SOURCE STATE TORT CLAIMS

A. *Merrick v. Diageo*

On November 2, 2015, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision finding no CAA preemption of source-state claims for damages caused by ethanol emissions. A copy of the Sixth Circuit's opinion in

Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015), *rehearing en banc denied* Dec. 7, 2015, is appended hereto. The property owners' claims in Merrick are virtually indistinguishable from the present case. In Merrick, the plaintiffs are property owners surrounding Diageo's whiskey manufacturing facilities in Kentucky. Diageo's operations also pollute the atmosphere with ethanol which causes the germination and proliferation of black fungus on surrounding properties. The Sixth Circuit held:

> This interlocutory appeal concerns whether the federal Clean Air Act preempts common law claims brought against an emitter based on the law of the state in which the emitter operates. ***The Clean Air Act's text makes clear that the Act does not preempt such claims.*** This conclusion is further supported by the Act's structure and history, together with relevant Supreme Court precedents.

Id. at p. 686 (emphasis added). Given the strength of local interests in pollution control, even if the express language of the CAA did not preserve state action, the Sixth Circuit would nevertheless have found claims such as those presented here are not impliedly preempted:

> The question whether state law is preempted demands due "regard for the presuppositions of our embracing federal system." [Quoting AEP, 131 S.Ct. at 2537] (internal citation omitted). When Congress acts to preempt state law—especially in areas of longstanding state concern—it treads on the states' customary prerogatives in ways that risk upsetting the traditional federal-state balance of authority. See Geib v. Amoco Oil Co., 29 F.3d 1050, 1058 (6th Cir. 1994). This is why there is a strong presumption against federal preemption of state law, one that operates with special force in cases "in which Congress has legislated . . . in a field which the States have traditionally occupied." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Environmental regulation is a field that the states have traditionally occupied. See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). Accordingly, even if the express language of the states' rights savings clause here did not preserve state common law claims, principles of federalism and respect for states' rights would likely do so in the absence of a clear expression of such preemption.

Id. at 694.

The same day the Merrick opinion was issued, the Sixth Circuit also affirmed the finding of no CAA preemption in Little v. Louisville Gas & Elec. Co., 33 F. Supp. 3d 791 (W.D. Ky. 2014) in Little v. Louisville Gas & Elec. Co., 805 F.3d 695, 698 (6th Cir. 2015).

B. *International Paper Co. v. Ouellette*

In International Paper Co. v. Ouellette, 479 U.S. 481 (1987), the U.S. Supreme Court undertook the conflict preemption analysis applicable here and determined that the Clean Water Act ("CWA") preempted the imposition of Vermont law upon a New York source of pollution, but held that the plaintiffs were not barred from pursuing nuisance claims under the common law of the source state of New York. Ouellette, 479 U.S. at 487. ("We hold that … the court must apply the law of the State in which the point source is located.")

With respect to preempting the application of Vermont law to a pollution source in New York, the court reasoned that Congress did not intend to empower one state to "override both the permit requirements and the policy choices made by the source State" and to "do indirectly what they could not do directly – regulate the conduct of out-of-state sources." Id. at 495. By contrast, the Act clearly reserved to each individual state the right to "impose higher standards on their own point sources, [including] the right to impose higher common-law as well as higher statutory restrictions." Id. at 497. Furthermore, the problem of affected states seeking to impose their extra-territorial laws on source states is not a concern when enforcing source state nuisance laws:

> An action brought against IPC under New York **nuisance law would not frustrate the goals of the CWA** as would a suit governed by Vermont

> law. First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. **Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements**.

Id. at 498-99 (emphasis added).

The Ouellette court also found that the Act's "saving clause[3] negates the inference that Congress 'left no room' for state causes of action." Id. at 492. After considering all of the federally enforceable methods of pollution control, it held, "The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." Id. at 497 (emphasis in Ouellette). As discussed further below, the courts agree that there is no meaningful difference between the savings clauses in the CWA and CAA, including the lower court in Ouellette which, on remand, denied a motion to dismiss the plaintiffs' air pollution claims applying Ouellette. Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 62 (D. Vt. 1987).

The U.S. Supreme Court's preemption analysis in Ouellette compels the conclusion that Appellees' tort claims asserted against a local Kentucky pollution sources are not preempted.

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[3] Note that when the Ouellette court refers to the savings clause (singular), it is actually referring to "two provisions …together [as] 'the saving clause.'" Id. at 485. See discussion of CAA savings clause infra at §II.D.

C. *American Electric Power*

Neither the express language of AEP nor the cases decided before and after it support the decision of the trial court. AEP was concerned exclusively with whether the CAA displaced federal common law claims and the court specifically cautioned against applying the federal common law displacement analysis to state law: "Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law." AEP, 131 S.Ct. at 2537 (internal quotation, brackets and citation omitted). With respect to CAA preemption of state law claims, AEP expressly directed courts to apply Ouellette which held "that the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State.'" Id. at 2540 (quoting Ouellette 479 U.S. at 497 (emphasis in Ouellette)).

The Court must resist being lured into adopting the wrong preemption analysis (federal common law displacement) by Appellants' repeated citations to AEP. The U.S. Supreme Court has warned against precisely what Appellants advocate. Courts considering preemption of state rights must not mix the very different concept of preemption of state law with legislative displacement of federal common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

City of Milwaukee v. Illinois & Michigan ("Milwaukee II"), 451 U.S. 304, 317 (1981)(internal quotation and citations omitted); see also AEP, 131 S.Ct. at 2537; MTBE, 725 F.3d at 96; Bell, 734 F.3d at 197, fn. 7.

Appellants' argument that AEP should be applied to preempt Appellees' claims ignores the language of the decision itself, long-standing Supreme Court precedent, the savings provisions of the CAA, its legislative history and the majority position of the courts.

D. Congressional Purpose and the CAA's Savings Clauses

That the CAA established only minimum emission standards and states are free to adopt additional protections through the courts or by statute as long the requirements imposed are not less stringent than those established under the Act is not a new concept. It is of course embodied in the Act itself. Congress' purpose in enacting the CAA is plainly stated in the provision, "Congressional Findings and Declaration of Purpose," 42 U.S.C. §7401, in which Congress stated that "air pollution control *at its source* is the primary responsibility of States and local governments." Id. at §7401(a)(3)(emphasis added). See also 42 U.S.C. §7401(b)(3) (purpose of CAA is "to provide technical and financial assistance" to states in air pollution prevention); 42 U.S.C. §7401(c) (goal is to encourage state actions for pollution prevention). The CAA's design makes source states primarily responsible for control of air pollution "through any measures." 42 U.S.C. §7401(a)(3).

Further, two savings clauses in the CAA preserve source state law claims. The savings clause within the "Citizens suits" section is entitled, "Statutory or common law rights not restricted." In this clause, Congress stated its intention not to "restrict any right which any person (or class of persons) may have under any statute **or common law** to seek enforcement of any emission standard or limitation **or to seek any other relief**." 42 U.S.C. §7604(e)(emphasis added). The plain language of this clause is that Appellees

have the right to seek any relief available to them at common law, and that they are not confined to citizens' suits.

The second savings clause in the CAA, entitled, "Retention of State Authority," 42 U.S.C. §7416, contains broad language preserving source states' rights to adopt and enforce air pollution requirements and standards in all areas except the three narrow moving sources defined in §§7543(a), 7545(c)(4)(A) and 7573.[4] It provides in pertinent part, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution...." According to this section, except for preempting regulation of specific moving sources, Congress expressly denied any intent to preempt any state standard or limitation on air pollution as long as it meets or exceeds CAA standards.[5]

With respect to *source* state common law, Ouellette concluded that the savings clauses "specifically preserved" such actions. Id. at 497. Textually, the savings clauses of the CWA and CAA are essentially the same. There is "no meaningful difference between" the savings clauses of the CWA and CAA. Bell, 734 F.3d at 195; See also Her

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[4] There are only three narrow express preemption clauses in the CAA, each of which pertains to moving sources of air pollution and is not applicable to Appellees' claims: 42 U.S.C. §7543(a) (new motor vehicle emissions), 42 U.S.C. §7545(c)(4)(A) (motor vehicle fuel additives) and 42 U.S.C. §7573 (aircraft emissions).

[5] §7416 is not limited to actions by state legislators and regulators. Similar arguments have been repeatedly rejected by the courts. See Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521 (1992); Riegel v. Medtronic, Inc., 552 U.S. 312, 323–24 (2008); Her Majesty the Queen In Right of The Province of Ontario v. The City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989); See also Freeman v. Grain Processing Corp., 848 N.W.2d 58, 83 (Iowa 2014)), *cert. denied*, 135 S. Ct. 712 (2014).

Majesty, 874 F.2d at 346-47 (Boggs, J. dissenting) ("the Clean Water Act... contains exactly the same savings clause as the Clean Air Act").

Sections 42 U.S.C. §§7401, 7416, and 7604 of the CAA show Congress' keen awareness of source state actions in remedying air pollution and a lack of express preemption other than for mobile air pollution sources. Congress' awareness of state tort actions in a field of federal interest without expressly preempting such claims makes actual conflict with a significant objective unlikely. Wyeth v. Levine, 555 U.S. 555, 575 (2009). It is Congress' expressly declared objective to "assist" and "promote" (not preempt) state actions to remedy pollution, 42 U.S.C. §7401(b)(3) and (c); to not restrict "common law" actions "seek[ing] any other relief," 42 U.S.C. §7604(e); and to purposefully protect state rights to impose "any requirements respecting control or abatement of air pollution." 42 U.S.C. §7416. Finding a significant objective requiring exclusion of source state common law actions for air pollution abatement and other relief would conflict with the plain meaning of these provisions.

E. *Bell v. Cheswick*

Before the lower court in Bell was reversed, Appellants had advocated reliance on the decision. In Bell v. Cheswick, 734 F.3d 188 (3rd Cir. 2013), *cert. denied*, GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014), the Third Circuit held that the CAA does not preempt source state tort claims like those presented here and in so doing rejected every preemption argument made by Appellants. Bell, like MTBE and Freeman, infra,[6] was decided long after the 1990 amendments to the CAA which Appellants

[6] The U.S. Supreme Court denied certiorari in all three of these CAA preemption cases in 2014.

incorrectly suggest changed the primary goal of federal air pollution legislation from one of "cooperative federalism" to one of economic protectionism.

In Bell, neighboring property owners filed a putative class action complaint alleging state common law claims including nuisance and trespass against GenOn's generating station for ash and contaminants that settled on their properties. The Bell court saw "no meaningful difference between" the savings clauses of the CWA and the CAA, Bell, 734 F.3d at 195, but like the Ouellette court, did not limit its preemption analysis to just the savings clauses. The Bell court considered Appellants' every argument against allowing source state claims and found that the Supreme Court had addressed all of these arguments in Ouellette before concluding that "'an action brought under source state nuisance law would not frustrate the goals of the [CAA] as would a suit governed by affected state law.'" Bell at 197 (quoting Ouellette, 479 U.S. at 498 (internal quotes, citation and brackets omitted)). Employing Ouellette's "straightforward reasoning" the Bell court likewise concluded that source state law does not "'disturb the balance'" between federal and state interests under the CAA or "'disrupt the regulatory partnership established by the permit system'" because stricter source state limitations are authorized by the Act. Id. (quoting Ouellette at 498–99). Further, although the imposition a source state's tort laws may "'create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable [and] States can be expected to take into account their own nuisance laws in setting permit requirements.'" Id.

Accordingly, the Third Circuit concluded, like the Supreme Court in Ouellette, that the "'cooperative federalism'" structure of the Act permits states "to impose higher

standards on their own sources of pollution, and that **state tort law is a permissible way of doing so**." Bell at 197-98 (citing Ouellette at 497–98). The Bell court also considered AEP, supra, and noted that nothing in the Supreme Court's displacement analysis in AEP "compels—or even presages—a corresponding finding of preemption" of source state claims. Bell at 197, n.7 (internal quotation and citation omitted).

Ouellette's and Bell's reasoning regarding why source state nuisance claims are not incompatible with the CAA applies equally to whiskey distillers' ethanol pollution. In Bell, GenOn's air pollution emissions were extensively regulated by federal, state and local authorities, including the issuance of an operating permit. Bell 734 F.3d at 191. However, as the court acknowledged, GenOn's permit did not relieve it from the obligation to comply with other state and local laws and regulations. Id. Likewise, Appellants' permits do not authorize them to create nuisances or to trespass or damage neighboring property.

F. *Her Majesty the Queen*

The Sixth Circuit has also determined that the CAA does not preempt source state tort claims. In Her Majesty the Queen, the plaintiffs asserted claims under the Michigan Environmental Protection Act ("MEPA") alleging that an incinerator's air emissions would pollute natural resources. 874 F.2d at 335. Plaintiffs in Her Majesty the Queen were four non-profit organizations that sued the defendants alleging that their incinerator emissions polluted and impaired the natural resources of the state of Michigan and that the City of Detroit failed to determine whether prudent and feasible solid waste disposal alternatives to construction of the incinerator were available or whether modifications to its design would avoid or reduce environmental pollution. 874 F.2d. at 335.

Under MEPA, Michigan courts could develop "a state common law of environmental quality." Id. at 338. The district court decided that the CAA preempted such claims; however, the Sixth Circuit reversed. The court held that under Ouellette it was clear that the claims were not preempted. Id. at 343. Notably, the lower court in Her Majesty had erroneously distinguished the common law nuisance claims at issue in Ouellette on the basis that Ouellette did not deal with air pollution claims. The Sixth Circuit observed, "there was no reason to think that the result with regard to air pollution should be different." Her Majesty, 874 F.2d at 343.

The court in Her Majesty also rejected the argument that judicial adjudication of common law pollution claims frustrated the permit system: "the plaintiffs' actions in state court, if successful, will not in any way alter or modify the validity of the federal permit previously issued. That permit will still be in existence, and will still be of full legal effect. If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the CAA." Id. at 344. The Sixth Circuit recognized that a state may adopt a more stringent standard and specifically highlighted Section 116 of the Clean Air Act 42 U.S.C. 7416 "Retention of State Authority" Id. at 336. Further, the Sixth Circuit emphasized the broad powers of the state with regard to emissions from a source within a state:

> Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles," and motor vehicle fuels and fuel additives. It has also pre-empted the field so far as emissions from airplanes are concerned. *So far as factories, incinerators, and other stationary devices are implicated, the States have broad control.*

Her Majesty the Queen, 874 F.2d at 335 (quoting Washington v. General Motors Corp., 406 U.S. 109, 114 (1972) (emphasis in Her Majesty the Queen).

The Sixth Circuit also dismissed defendants' arguments that Michigan's SIP absolved it of liability. Instead, the Court determined that even though the federal government may determine that a plant is not in violation with either state or federal environmental laws, Michigan courts are still empowered to determine whether the standards applied by the federal government are appropriate and if not, determine whether the plant would meet any more stringent standards selected by the Michigan courts. Id. at 341. The Sixth Circuit recognized that the plain language of the CAA intended to and did specifically preserve "state causes of action.... and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." Id. at 343 (quoting Ouellette, 479 U.S. at 492, 496 (emphasis in Ouellette)).

G. *MTBE*

The Second Circuit also directly addressed the preemptive effect of the CAA, including the 1990 Amendments, in MTBE, 725 F.3d 65, and held that the CAA does not preempt source state tort law. The defendant in MTBE, Exxon, produced and distributed gas in New York that contained MTBE, an additive that raised oxygen levels for cleaner burning gas. In its capacity as a property owner, New York City sued Exxon alleging negligence, trespass, nuisance and failure-to-warn under New York (source state) law for property damage due to MTBE contamination of city-owned water wells. A jury found in favor of the city and awarded $104.69 million in damages.

The Second Circuit rejected Exxon's CAA conflict preemption defense and affirmed the judgment.[7] In rejecting Exxon's implied preemption defenses, the MTBE court followed Supreme Court precedent including the presumption that in areas of the states' historic police powers, state law is not preempted by federal statute "'unless that was the clear and manifest purpose of Congress.'" MTBE, 725 F.3d at 96 (quoting Wyeth, 555 U.S. at 565). Affirming the verdict, it held:

> Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn—as the jury did here—falls well within the state's historic powers to protect the health, safety, and property rights of its citizens. In this case, therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong.

MTBE at 96.

Exxon, like Appellants here, argued that a primary purpose of the Act is to control the economic burden of pollution regulation and that a state tort judgment that forbade from using MTBE, a more cost effective additive than other alternatives, stands as an obstacle to that purpose. The Second Circuit rejected this argument reasoning that Congress' cost concerns[8] "hardly establish that Congress had a 'clear and manifest intent' to preempt state tort judgments." Id. at 103 (citation omitted).

Thus, the MTBE court rejected arguments similar to those made by Appellants that because common law remedies impose economic burdens on in-state polluters they are preempted. See also Williamson v. Mazda Motor of America, Inc., 131 S.Ct. 1131,

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[7] The CAA's preemptive effect was at issue, rather than the CWA, because at the time, the CAA required additives to reduce vehicle emissions and MTBE was an approved additive.

[8] Exxon cited to specific cost containment language in the 1990 amendments pertaining to fuel. Defendants cite no expression of specific Congressional intent in the Act to contain costs for their ethanol emissions (there are none).

1139 (2011) (consideration of costs shows no intent to bar stricter state standards or state tort law supplementation).

H. *Freeman v. Grain Processing*

The Iowa Supreme Court recently provided a comprehensive overview of CAA preemption jurisprudence including a review of a multitude of treatises on the subject and concluded that source state tort claims indistinguishable from those presented here are not preempted. Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014), *cert. denied*, 135 S. Ct. 712 (2014). Additionally, numerous district courts are in accord that the CAA does not preempt state tort claims.[9]

Iowa, like Kentucky, recognizes causes of action for environmental complaints under common and statutory nuisance law and common law trespass. Id. at 67-68. Addressing the differences between state law remedies and the CAA, the Iowa court pointed out that the CAA does not provide individual remedies whereas "the common law focuses on special harms to property owners caused by pollution at a specific location." Id. at 69-70.

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[9]See, e.g., Cooper v. International Paper Co., 912 F. Supp. 2d 1307, 1320 (S.D. Ala. 2012) (claims for negligence, public nuisance, private nuisance, and related claims not preempted by federal anti-pollution legislation including CAA); Gutierrez v. Mobil Oil Corp., 798 F.Supp. 1280, 1282 (W.D. Tex. 1992)(CAA does not preempt negligence, gross negligence, trespass, and injunctive relief); Cerny v. Marathon Oil Corp., 2013 WL 5560483 (W.D. Tex. 2013)(state claims not preempted); Technical Rubber Co. v. Buckeye Egg Farm, L. P., 2000 WL 782131, at *3-5 (S.D. Ohio 2000) (holding that Clean Air Act does not preempt common-law nuisance claim, relying on Her Majesty the Queen and Ouellette); Portage County Bd. of Com'rs v. City of Akron, 12 F. Supp. 2d 693, 702 (N.D. Ohio 1998) (same re: Clean Water Act); Moon v. N. Idaho Farmers Ass'n, 2002 WL 32102995 at *3-5 (Idaho Dist. Ct. 2002) (rejecting contention that Clean Air Act preempts common-law nuisance and trespass claims). Unreported decisions cited for their persuasive, not authoritative, value.

Like the overwhelming majority of courts, the Iowa court rejected every one of Appellants' arguments and concluded that source state tort claims are consistent with the CAA:

> In this case we deal with a claim that seeks to regulate pollution based on the law of the source state. This is precisely the kind of cooperative federalism anticipated by the statute. GPC is not subject to a dozen or more regulatory regimes, but only two. The notion that a person must comply with parallel state and federal law requirements that may not be uniform is not new to the law. As recognized in Ouellette, on the one hand, state "nuisance law may impose separate standards and thus create some tension with the permit system," but, on the other hand, "the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations."

Id. at 83-84 (citing Ouellette, 479 U.S. at 499). The court recognized that environmental regulation is complex but stated:

> It is important in our view, however, not to conflate increased complexity with the issue of conflict preemption. Notwithstanding the increased complexity, the cooperative federalism framework and the notion that states may more stringently regulate remains a hallmark of the CAA.
>
> Further, state common law and nuisance actions have a different purpose than the regulatory regime established by the CAA. The purpose of state nuisance and common law actions is to protect the use and enjoyment of specific property, not to achieve a general regulatory purpose. It has long been understood that an activity may be entirely lawful and yet constitute a nuisance because of its impairment of the use and enjoyment of specific property. [Citations omitted.] We therefore decline to conclude that the increased complexity of the CAA has categorically elbowed out a role for the state nuisance and common law claims presented here.

Id. at 84.

With respect to arguments that "controversies over source-state pollution are best left to administrative agencies and the rulemaking process" and "that there should be a uniform approach to these questions," the court observed that although these arguments have "policy appeal," they run "against the grain of bilateral cooperative federalism

manifest in the any measures clause, the retention of state authority savings clause, and the citizens' rights savings clause of the CAA." Id. at 83 (citing 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e)).

I. *Cooper v. TVA*

Appellants argue that the Fourth Circuit's decision in N. Carolina, ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291 (4th Cir. 2010) ("TVA"), supports its position that the CAA preempts source state common law. It does not. In TVA, the lower court impermissibly applied non-source state law. Id. at 306-07 ("while the district court acknowledged the proper standard… it for all practical purposes applied North Carolina's Clean Smokestacks Act extraterritorially in Alabama and Tennessee"). The Sixth Circuit agrees that it was the impermissible imposition of non-source state law that compelled the holding in Cooper:

> *Cooper,* however, did not involve claims under the common law of the source state. Rather, *Cooper* involved claims against Alabama and Tennessee sources brought under North Carolina law. *Id.* at 297. That difference was dispositive on the preemption issue, for reasons having to do with federalism and the holding in *Ouellette:*
>
> > [T]he district court's decision compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee. There is no question that the law of the states where emissions sources are located, in this case Alabama and Tennessee, applies in an interstate nuisance dispute. The Supreme Court's decision in *Ouellette* is explicit: a "court must apply the law of the State in which the point source is located." 479 U.S. at 487, 107 S.Ct. 805. While *Ouellette* involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act.

Merrick v. Diageo, 805 F.3d at 692-93 (quoting Cooper at 306)

Thus, when the Fourth Circuit found that the claims were preempted, it found that the law of an affected state, North Carolina, was preempted. It did not find that claims or

causes of action under the law of the source-states, Alabama and Tennessee, were preempted. To the extent that TVA can be (mis)interpreted as holding that private rights of action for nuisance and trespass are preempted, it has been rejected by every court to consider it. See, e.g., Bell, MTBE, Freeman, Merrick v. Diageo Americas Supply, Inc., 5 F. Supp. 3d 865, (W.D. Ky. 2014) aff'd, 805 F.3d 685 (6th Cir. 2015), Little v. Louisville Gas & Elec. Co., 33 F. Supp. 3d 791, (W.D. Ky. 2014) aff'd in part sub nom, Little v. Louisville Gas & Elec. Co., 805 F.3d 695 (6th Cir. 2015), Mills, and Alleyne v. Diageo USVI, Inc., No. SX-13-CV-143, 2015 WL 5511688 (V.I. Super. Sept. 17, 2015).[10]

III. THE CIRCUIT COURT ERRED IN FAILING TO APPLY THE CLEAR AND MANIFEST CONGRESSIONAL INTENT REQUIRED TO PREEMPT STATE LAW

The application of federal preemption to eliminate state causes of action is not a choice a trial court can make based upon a perception that the subject matter may be better suited to a specialized agency. "[P]reemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968, 1985 (2011) (internal quotation and citations omitted). Appellees have state law rights that cannot be taken away without a manifest congressional purpose. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317 (1981) ("Milwaukee II"). By contrast, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." AEP, 131 S.Ct. at 2537 (quoting Milwaukee II, 451 U.S. at 317). The test for whether congressional legislation excludes *federal* common law is

[10] Unpublished opinions cited for their persuasive, not precedential, value.

"simply whether the statute speaks directly to the question at issue." AEP at 2537 (internal quotation and citations omitted). In applying AEP's federal common law legislative displacement analysis to Appellees' claims, the trial court erred. The U.S. Supreme Court has warned not to mix the very different concept of preemption of state law with legislative displacement of federal common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Milwaukee II, 451 U.S. at 317 (internal quotation and citations omitted); see also AEP, 131 S.Ct. at 2537; MTBE, 725 F.3d at 96; Bell, 734 F.3d at 197 (fn. 7); Niehoff v. Surgidev Corp., 950 S.W.2d 816, 820 (Ky. 1997).

In the present case, the trial court did not – because it cannot – articulate a clear and manifest congressional intent in the CAA to preempt state law. Instead, it simply displaced Kentucky tort law with agency regulations. This is impermissible under preemption jurisprudence.

A. Express Preemption Was Not Argued and the Implied Preemption Doctrines Cannot Apply In Light of Congress' Clear Intent Not To Preempt State Law

Courts recognize three types of preemption: express preemption and the implied doctrines of field and conflict preemption. Arizona v. U.S., 132 S.Ct. 2492, 2500-01 (2012); MTBE, 725 F.3d at 96-97; Bell, 734 F.3d at 193; Abel Verdon Constr. v. Rivera, 348 S.W.3d 749, 754 (Ky. 2011); Niehoff, 950 S.W.2d at 820. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation and citations omitted). Negligence, trespass,

nuisance and pollution are within the states' historic police powers,[11] and thus there can be no preemption absent a clear and manifest purpose of Congress. Milwaukee II, 451 U.S. at 317; Bell, 734 F.3d at 197, fn. 7; Niehoff, 950 S.W.2d at 820.

Express Preemption. Appellants did not argue express preemption below because nothing in the CAA expressly preempts Appellees' state tort claims. Memorandum in Support of Motion to Dismiss, pp. 9; 11 fn.11 [R. 243; 245]. There are only three narrow express preemption clauses in the CAA, each of which pertains to moving sources of air pollution and is not applicable to Appellees' claims.[12]

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of expression *unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (internal quotation and citations omitted). Thus, the fact that the CAA expressly preempts a narrow class of state action implies that Appellees' claims are not preempted. Moreover, looking beyond the CAA's limited express preemption provisions, Congress not just impliedly, but expressly, stated its intent not to preempt Appellees' claims. "Retention of State Authority" 42 USC §7416 contains broad language preserving source states' rights to adopt and enforce air

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[11]Specifically with respect to whiskey fungus, respected jurist Hon. John G. Heyburn, II in Brockman v. Barton Brands, Ltd., 2009 WL 4252914 (W.D. Ky. 2009), concluded, based upon the nascent science publically available in 2009, that if the black particulate matter on the plaintiffs' property was in fact mold caused by the whiskey distiller's ethanol emissions, such proof would be sufficient to proceed on the torts of nuisance and trespass. This unreported decision is cited for its persuasive, not authoritative, value.

[12] 42 USC §7543(a) (new motor vehicle emissions), 42 USC §7545(c)(4)(A) (motor vehicle fuel additives) and 42 USC §7573 (aircraft emissions).

pollution requirements and standards in all areas except the three narrow moving sources defined in §§7543(a), 7545(c)(4)(A) and 7573. These sections neatly create a situation where Congress defined the preemptive reach of the Act with "no need to infer congressional intent to pre-empt state laws from the substantive provisions." Cipollone at id. All matters outside the narrow preemptive reach defined by these sections are not preempted. While this expression of congressional intent should end the analysis in Appellees' favor under Supreme Court precedent, field and conflict preemption will be discussed as Appellants advocated their application in this case.

Field Preemption. States cannot regulate when Congress regulates a field exclusively. Arizona, 132 S.Ct. at 2501. Field preemption applies only if all state regulation is foreclosed, even that "parallel to federal standards." Id. at 2502. Intent to totally exclude state regulation can be inferred from 1) a pervasive regulatory framework with no room for supplementation, or 2) a federal interest so dominant it necessarily excludes enforcing state laws on the same subject. Id. at 2503. The CAA's structure reserving authority for state regulation and allowing stricter state regulation precludes finding an intent to leave no room for supplementation or a federal interest dominant enough to exclude all state laws. Id. Plus, Congress expressly declared its intention **not** to "restrict any right which any person (or class of persons) may have under any statute ***or common law*** to seek enforcement of any emission standard or limitation ***or to seek any other relief***." 42 USC §7604(e)(emphasis added). Except for narrow sections preempting regulation of moving sources, Congress expressly denied any intent to preempt any state regulation, requirement or standard on control or abatement of emissions of air pollutants as long as state standards meet or exceed CAA standards. 42 USC §7416. It also

recognized the role of common law suits in enforcing emission limitations and providing relief for harm caused by air pollution. 42 USC §7604(e). Also, express statements in 42 USC §7401 entitled, "Congressional Findings and Declaration of Purpose" refute any inference of intent to preempt state measures to reduce, eliminate, or control emissions of air pollutants. 42 USC §7401(a)(3) provides, "[A]ir pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." See also 42 USC §7401(b)(3) (purpose of CAA is "to provide technical and financial assistance" to states in air pollution prevention); 42 USC §7401(c) (goal is to encourage state actions for pollution prevention). The CAA's design makes source states primarily responsible for prevention, reduction, elimination, and control of air pollution "through any measures." 42 USC §7401(a)(3). This and the foregoing sections inviting state action is at complete odds with field preemption.

Conflict Preemption – Impossibility. For a preemptive conflict to exist it must be impossible to comply with both federal and state law or the state law sought to be enforced must present an obstacle to the full purposes and objectives of Congress. Arizona at 2501; MTBE, 725 F.3d at 97; Bell, 734 F.3d at 193; Rivera, 348 S.W.3d at 755.

> Impossibility pre-emption is a demanding defense that requires the defendant to show an irreconcilable conflict between federal and state legal obligations. The logic underlying true impossibility pre-emption is that when state and federal law impose irreconcilable affirmative requirements… the inference that Congress would have intended federal law to displace the conflicting state requirement is inescapable. So, for example, if federal law requires a particular product label to include a complete list of ingredients while state law specifically forbids that labeling practice, there is little question that state law must yield. ***The key inquiry for impossibility pre-emption, then, is to identify whether state***

> ***and federal law impose directly conflicting affirmative legal obligations such that state law requires the doing of an act which is unlawful under federal law. Impossibility does not exist where the laws of one sovereign permit an activity that the laws of the other sovereign restricts or even prohibits.*** So, to modify the previous example, if federal law permitted (but did not require) a labeling practice that state law prohibited, there would be no irreconcilable conflict; a manufacturer could comply with the more stringent regulation.

Mutual Pharmaceutical Co., Inc. v. Bartlett, 133 S.Ct. 2466, 2485-86 (2013) (internal quotations and citations omitted, emphasis added). Appellants argue that Appellees' requested relief for Appellants' ethanol emissions is preempted because (a) Appellees did not allege that Appellants' ethanol emissions exceeded permissible levels under their operating permits; and (b) Appellants are not required to control "fugitive" ethanol emissions from their aging operations. Memorandum in Support of Motion to Dismiss, pp. 3-6 [R. 237-40]. Appellants do not argue, because they cannot, that granting Appellees' requested relief (*e.g.*, paying for property damage caused by whiskey fungus and reducing ethanol emissions) would conflict with their air pollution control responsibilities under the CAA. Assuming *arguendo* that Appellants are in compliance with their statutory obligations (the First Amended Complaint clearly alleges that they are not because Appellants release ethanol into the atmosphere in amounts similar or greater than Diageo which was issued a Notice of Violation for its ethanol emissions [R. 163-164])), they would still be in compliance if they adjusted their conduct (*e.g.*, by decreasing ethanol emissions) to avoid causing further damage to surrounding property. "[A]bsent a direct conflict between two mutually incompatible legal requirements, there is no impossibility and courts may not automatically assume that Congress intended for state law to give way. Instead, a more careful inquiry into congressional intent is called

for, and that inquiry should be informed by the presumption against pre-emption." Bartlett, 133 S.Ct. at 2486.

In MTBE, 725 F.3d at 97-103, discussed above, the Second Circuit in the context of the CAA rejected impossibility conflict preemption. The city, acting as a property owner, sued Exxon for contaminating its property with MTBE, a gasoline additive that was highly soluble in groundwater and highly prone to spread, and proved there were safer options (*i.e.*, ethanol). Exxon argued conflict preemption because MTBE was among the oxygenates that had been approved by the EPA and it introduced evidence that using ethanol increased production costs. Id. at 101. This was insufficient. "To meet its burden with respect to the impossibility branch of conflict preemption, Exxon needed to demonstrate that it *could not* comply with the federal oxygenate requirement by using a compound other than MTBE." Id. at 100 (emphasis in original).

> The party urging preemption must do more than show that state law precludes its use of the most cost-effective and practical means of complying with federal law—it must show that federal and state laws "directly conflict." [AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 227 (1998)]. If there was any available alternative for complying with both federal and state law—even if that alternative was not the most practical and cost-effective—there is no impossibility preemption.

Id. at 99. See also Williamson v. Mazda Motor of America, Inc., 131 S.Ct. 1131, 1139 (2011) (consideration of costs shows no intent to bar stricter state standards or state tort law supplementation). No conflict exists between strict state standards and less stringent federal ones especially when Congress repeatedly expresses its intent for both to coexist under a federal Act. See e.g., 42 USC §7416; and see International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (interpreting similar savings clause in Clean Water Act and holding that "[b]y its terms the CWA allows States such as New York to impose higher standards on their own point sources, and in Milwaukee II we recognized that this

authority may include the right to impose higher common-law as well as higher statutory restrictions.") Impossibility preemption likewise cannot apply here to state common law claims that may require Appellants to limit their ethanol emissions to levels less than their permits allow. In the case of whiskey manufacturer Diageo, the Louisville Air Pollution Control Board noted a violation of local regulation causing harm to surrounding property *without reference to permissible levels of ethanol emissions*. [R. 163-164]. Appellants are causing the same harm to Appellees' property. Am. Complt. ¶84 [R. 164].

Conflict Preemption – Obstacle. Obstacle preemption requires actual conflict with a "significant objective" of the Act. Williamson, 131 S.Ct. at 1136. Tension between state and federal law does not constitute actual conflict with a significant objective. Whiting, 131 S.Ct. at 1985. "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." Id. (internal quotation and citation omitted). Congress' awareness of state tort actions in a field of federal interest without expressly preempting such claims makes actual conflict with a significant objective unlikely. Wyeth, 555 U.S. at 575. Sections 42 USC §§7401, 7416, and 7604 of the CAA show Congress' keen awareness of source state actions in remedying air pollution and a lack of express preemption other than for mobile air pollution sources. It is Congress' expressly declared objective to "assist" and "promote" (not preempt) state actions to remedy pollution, 42 USC §7401(b)(3) and (c); to not restrict "common law" actions "seek[ing] any other relief," 42 USC §7604(e); and to purposefully protected state rights to impose "any requirements respecting control or abatement of air pollution." 42 USC §7416. A significant objective requiring exclusion of source state common law

actions for air pollution abatement and other relief would conflict with the plain meaning of these provisions.

Exxon argued obstacle conflict preemption in MTBE, too, claiming the jury effectively required it to use a costly alternative which created an obstacle to Congress' purpose of reducing air pollution through gasoline additives without imposing economic burdens on gasoline manufacturers. To support its claim of congressional intent not to impose economic burdens on gasoline manufacturers, Exxon relied on a provision requiring "the EPA to take 'into consideration the cost of achieving... emissions reductions when drafting regulations" on gasoline additives. MTBE, 725 F.3d at 102. The Second Circuit rejected this argument reasoning the purpose of the 1990 CAA Amendments was to achieve a "significant reduction in carbon monoxide levels." Id. In regard to the cost consideration language in the authorization for EPA regulations, the Second Circuit reasoned:

> [A]lthough these legislative materials demonstrate that Congress was sensitive to the magnitude of the economic burdens it might be imposing by virtue of the Reformulated Gasoline Program and perhaps sought to limit them, they hardly establish that Congress had a "clear and manifest intent" to preempt state tort judgments that might be premised on the use of one approved oxygenate over a slightly more expensive one.

Id. at 103 (citation omitted).

Overall, the CAA shows a federal interest in minimum national standards and achieving better air quality by supporting effective source state action. The federal role is not one of preemption, but rather supporting source state remedies. Promoting source state actions is especially important for local or regional industries creating pollution with

primarily local effects.[13] The problem of whiskey fungus due to distilled spirits emissions is a fixed source localized issue. Thus, the structure and purpose of the CAA weighs heavily against preemption of Appellees' claims.

B. The Trial Court Erred In Choosing to Rely on Cooper Rather Than the Majority Rule

The Supreme Court's Ouellette and AEP decisions, the Second Circuit's MTBE decision, the Third Circuit's Bell decision, the Sixth Circuit decisions in Her Majesty the Queen and Merrick v. Diageo, the Iowa Supreme Court's decision in Freeman, the Frankfort County Circuit Court decision in Mills all establish the majority rule that (1) federal pollution regulation in the CAA does not preempt causes of action based on the common law, statutory law or regulatory law of the source-state; (2) does preempt causes of action based on the common law, statutory law, regulatory law, or any other law of affected (non-source) states; and (3) the federal statutes supplant or displace causes of action based on federal common law.

The Fourth Circuit recognized these rules in Cooper:

> "'[I]f affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" [quoting Ouellette at 493-94 (other citation omitted)]. We thus cannot allow ***non-source states*** to ascribe to a generic savings clause a meaning that the Supreme Court in Ouellette held Congress never intended....

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[13] The production of distilled spirits in the United States is confined to localized areas in only a few States. Table 2-1 from page 2-2 [R. 500] of EPA, Office of Air Quality Planning and Standards, Emission Factor and Inventory Group, Emission Factor Documentation for AP-42: Section 9.12.3 – Distilled Spirits, Final Report (1997) shows 93.17% of all distilled spirits production in the United States took place in the three state region of Kentucky, Tennessee and Indiana. 99.8% of United States whiskey production comes from Kentucky (68.4%), Tennessee (25%) and Indiana (6.4%). A copy of the 1997 Report was referenced by Appellees in their Motion to Dismiss and, without waiving objections to the document, a copy was attached to Appellees' Response to the Motion to Dismiss at Exhibit 5 [R. 491-520].

> [T]he district court's decision compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee. ***There is no question that the law of the states where emissions sources are located, in this case Alabama and Tennessee, applies in an interstate nuisance dispute.*** The Supreme Court's decision in Ouellette is explicit: a "***court must apply the law of the State in which the point source is located.***" 479 U.S. at 487. While Ouellette involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act.
>
> Unfortunately, while the district court acknowledged the proper standard... it for all practical purposes applied North Carolina's Clean Smokestacks Act extraterritorially in Alabama and Tennessee. The decision below does little more than mention the black letter nuisance law of Alabama and Tennessee on its way to crafting a remedy derived entirely from the North Carolina Act....
>
> The Supreme Court emphasized that only source state law, here that of Alabama and Tennessee, could impose more stringent emission rates than those required by federal law on plants located in those two jurisdictions. Ouellette, 479 U.S. at 494-97.... [The district court's] decision was tied so tightly to the North Carolina Clean Smokestacks Act that it violates Ouellette's directive that source state law applies to interstate nuisance suits.

Cooper, 615 F.3d at 304, 305-307, 309.

Thus it appears that although the non-source state litigants in non-source state courts claimed to invoke source state law, the actual finding by the court in Cooper was that the non-source state courts were applying a non-source state interpretation of the law. See Merrick v. Diageo, 805 F.3d at 693 ("The Fourth Circuit in Cooper applied the same framework the Third Circuit applied in Bell and the Iowa Supreme Court applied in Freeman. All three courts distinguished between claims based on the common law of the source state—which are not preempted by the Clean Air Act—and claims based on the common law of a non-source state—which are preempted by the Clean Air Act.")

As the Fourth Circuit said, "the district court...for all practical purposes applied North Carolina's Clean Smokestacks Act extraterritorially...." Id. at 306-07. Thus, when

the Fourth Circuit found the State of North Carolina's claims were preempted, it found that the law of an affected state, North Carolina, was preempted. It did not find that claims or causes of action under the law of the source-states, Alabama and Tennessee, were preempted. The language of the Fourth Circuit's decision in Cooper preserves the distinction between source-state law and affected-state law as laid down in Ouellette.

The court in Cooper did proceed to announce that *even if* source state law had been applied (which it ruled had *not* been applied, thus the court's discussion on this point is dicta), it would not uphold a public nuisance injunction under source state law for activities expressly permitted *absent negligence*. Cooper, 615 F.3d at 310. It provided a "non-exclusive discussion" of private law remedies, including suits against the defendants. Id. at 311. Thus, Cooper does not stand for the proposition that the CAA displaces the courts. To the extent that Cooper can be (mis)interpreted as preempting private rights of action for nuisance, trespass and the like, it has been severely criticized by at least one court and two Harvard Law Review articles. See E.I. Dupont De Nemours and Company v. Kolon Industries, Inc., 2012 WL 4490547, 25 (E.D.Va. 2012) [R. 542-66], (Cooper "simply applied the wrong law in direct contravention to the decision of the Supreme Court of the United States specifying the law to be applied"). See also "Federal Preemption of State Law – Implied Preemption- Fourth Circuit Holds that State Public Nuisance Suit Against Electricity – Generating Plant Emissions is Preempted by the Clean Air Act Regime," 124 Harv. L. Rev. 1813, 1820 (2010-2011) [R. 568-575] ("the court's preemption holding implies that Congress meant what it did not say and said what it did not mean, undermining the first principal that ours is a government of laws and not of men." [R. 575]); Nigel Barrella, Student Author, "North Carolina v. Tennessee Valley

Authority," 35 Harv. Envtl. L. Rev. 247, 262 (2011) [R. 577-592] ("If taken seriously and literally, this case's reasoning would remove from state discretion a large swath of environmental policy decisions, in a way that Congress almost certainly did not intend." [R. 592].)

Cooper was not relied upon by the trial court in the initial order dismissing. [R. 687-690]. As discussed above regarding the procedural history of this case, the cases initially relied upon by the trial court (the three lower court decisions in Bell, Homer and Comer) have either been reversed outright or by implication. Bell was expressly reversed, 734 F.3d 188, and the district court judge who wrote the Homer decision was the same judge who wrote the reversed Bell opinion using virtually verbatim language. The day after the Bell reversal, the Third Circuit issued its opinion in Homer which did not affirm the dismissal on preemption grounds but instead ruled that the claims had not been preserved for appeal. 727 F.3d at 300. The final district court decision relied upon by the trial court was not affirmed on preemption grounds either; instead, the Fifth Circuit found the entire action was subject to dismissal pursuant to *res judicata* without approving the lower court's preemption analysis. Comer, 718 F.3d 460. Comer was also a highly unusual case in which Hurricane Katrina victims sued oil companies alleging that their release of by-products increased global warming (an intrinsically extra-territorial problem) which led to development of conditions that formed hurricanes. By contrast, Appellants here are practically Appellees' next door neighbors and the whiskey fungus their operations cause grows on and in proximity to their facilities. The preemption discussion in the district court's Comer decision also lacks depth, completely ignores the text of the CAA including the savings clauses, and its holding ("plaintiffs' entire lawsuit

is displaced by the Clean Air Act") applies the displacement test for federal common law, not the clear and manifest intent analyses necessary to preempt state common law. Comer, 839 F. Supp. 2d at 865. As a result, we are left with no support for the trial court's decision other than the flawed dicta of Cooper. A clear majority, including the Sixth Circuit and binding U.S. Supreme Court precedent on point, requires the reinstatement of Appellees' claims.

CONCLUSION

Wherefore, Appellees respectfully request this Court to affirm the Opinion of the Kentucky Court of Appeals reversing and remanding the Jefferson Circuit Court Order dismissing Appellees' First Amended Complaint.

Respectfully submitted by:

William F. McMurry
WILLIAM F. MCMURRY & ASSOCIATES
624 W. Main Street, Suite 600
Louisville, KY 40202
Telephone: (502) 326-9000
Co-Counsel for Appellees

Douglas H. Morris
Lea A. Player
MORRIS & PLAYER PLLC
1211 Herr Lane, Suite 205
Louisville, KY 40222
Co-Counsel for Appellees